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IN THE

Supreme Court of the United States

OCTOBER TERM, ~~1950~~ 51

No. 372 85

IDONAH SLADE PERKINS,

Petitioner,

v.

BENGUET CONSOLIDATED MINING COMPANY, an alien business association known as Sociedad Anonima, et al.,

Respondents.

PETITION OF IDONAH SLADE PERKINS FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Idonah Slade Perkins, prays that a writ of certiorari issue to review the order and judgment entered by the Supreme Court of Ohio on March 21, 1951 and the order denying the application for rehearing entered April 18, 1951 in the two above styled causes, which were consolidated, and in which the identical issue was raised.

OPINIONS BELOW

The opinion of the Supreme Court of Ohio is reported in 155 Ohio State 116 (advance sheets Ohio Bar issue of March 26, 1951). The opinion of the Court of Appeals is reported in 88 Ohio App. 118 (advance sheets Ohio Bar issue of March 19, 1951). An opinion in a companion case, raising the identical issue here involved is reported as *Perkins* vs. *First National Bank, et al* 37 Ohio Opinions 162.

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on March 25, 1951, and application for rehearing filed in accordance with Rule XX of the Rules of the Supreme Court of Ohio was denied on April 18, 1951. The jurisdiction of this Court is invoked under the provisions of 28 U. S. C., Section 1251 (3).

The Supreme Court of Ohio on its own motion held that the service of process on Benguet Consolidated Mining Company was "void as wanting in due process of law within the meaning of that term as used in the 14th Amendment to the Constitution of the United States." Respondents, Benguet Consolidated Mining Company, appeared specially in the Court of Common Pleas of Clermont County to quash service of summons. Respondents did not at any time claim that the service of process violated the terms of the Fourteenth Amendment of the Constitution of the United States in the Court of Common Pleas, Court of Appeals or Supreme Court of Ohio. *The Supreme Court on its own motion for the first time held* that the service of process was violative of the due process clause of the Fourteenth Amendment to the Constitution of the United States, thereby depriving plaintiff of a right to maintain an action in the courts of Ohio although the alleged foreign corporation was present in Ohio, and per-

sonal service was obtained on the President and General Manager of respondent.

QUESTIONS PRESENTED

Where there is a foreign corporation doing business in Ohio and present in the state, which has not appointed a statutory agent upon whom service can be made, and service is made upon the president and general manager of the foreign corporation, is the service void because the cause of action was brought by a non-resident and the cause of action did not arise in the state and was not related to the business or activities of the corporation in the state? The Supreme Court of Ohio held such service void, *not because of any statute or policy of the State of Ohio, but solely because of the provisions of the Fourteenth Amendment to the Constitution of the United States.*

The decision is directly contrary to that of the Court of Appeals for the Sixth (Ohio) Circuit in *Maichak* vs. *Bertha Consumers*, 25 Fed. (2nd) 257 (C. C. A. 6). On the constitutional question it is likewise in direct conflict with a decision of Judge Learned Hand in *Bomze* vs. *Nardis* Sportswear, 165 Fed. (2nd) 33 (C. C. A. 2).

The Supreme Court of Ohio holds that while a non-resident individual can bring an action against a non-resident individual no matter where the cause of action arose, that because of the due process clause in the Fourteenth Amendment of the Constitution of the United States a non-resident cannot bring such an action against a foreign corporation even if it is doing business in Ohio. Petitioner contends that such a ruling is discriminatory and violates her rights as a citizen of the United States under the provisions of Article II, Section 4 of the Constitution of the United States that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

STATUTE INVOLVED

The Supreme Court of Ohio did not declare any statute void, but held that process served upon a president and general manager was void and violative of the due process clause because the cause of action did not arise in the state, and was not related to the business or activities of the corporation in the state. There is no statute or policy of the state in reference to such service, but Section 11290, Ohio General Code and Section 11276, Ohio General Code are pertinent.

> Section 11290, General Code: "When the defendant is a foreign corporation, having a managing agent in this state, the service may be upon such agent."
>
> Section 11276, General Code: "An action other than one of those mentioned in sections eleven thousand two hundred and sixty-eight, eleven thousand two hundred and sixty-nine, eleven thousand two hundred and seventy and eleven thousand two hundred and seventy-one against a non-resident of this state, or a foreign corporation, may be brought in any county in which there is property of, or debts owing to the defendant, or where such defendant is found, or where the cause of action or some part thereof, arose."

This case does not come within the exceptions of the statute, and the undisputed and admitted evidence shows that Benguet Consolidated Mining Company had deposits in both the New Richmond National Bank in Clermont County, Ohio, and in the First National Bank of Cincinnati, Ohio.

STATEMENT OF CASE

Benguet Consolidated Mining Company is a sociedad anonima organized under the laws of the Philippine Islands, and engaged in the business of mining gold. While by its own admissions Benguet Consolidated Mining Com-

pany has been held to be a partnership, the Ohio Supreme Court held in this action that it was entitled to be considered a foreign corporation so far as service of process is concerned. From that portion of the ruling we do not petition this court to review the decision, but start with the premise that it is entitled to be considered a foreign corporation.

The petitioner; Idonah Slade Perkins, claimed ownership to stock in Benguet, which, if her contention is correct, it will be admitted total 144,000 shares. The California courts, following a decision of the New York Court of Appeals, held that the petitioner was the owner of these shares in the Benguet Consolidated Mining Company. By way of attachment in California, she recovered from Benguet a judgment for a substantial portion of the *cash* dividends due on her stock. However, Benguet has refused to deliver to her the 120,000 shares of stock due her as stock dividends, and the balance of cash dividends. See *Perkins* vs. *Guaranty Trust Co.*, 274 N. Y. 250, 8 N. E. (2nd) 849, and *Perkins* vs. *Benguet Consolidated Mining Company*, 55 Cal. App. (2nd) 720, 132 Pac. (2nd) 70, rehearing denied 55 Cal. App. (2nd) 775, 132 Pac. (2nd) 102, petition for certiorari denied 319 U. S. 774; 60 Cal. App. (2nd) 845, 141 Pac. (2nd) 19; c. d. 320 U. S. 803, 815.

Thereafter, on April 4, 1947 the petitioner brought two actions in the Court of Common Pleas of Clermont County, Ohio, joining as defendants Benguet Consolidated, John W. Haussermann and the New Richmond National Bank. One action sought recovery of $68,400.00 for cash dividends declared, but never paid to petitioner. The second action was for damages for $2,500,000.00 for damages for wrongfully withholding the stock due her.

Service of summons on Benguet Consolidated Mining Company was made in each case by serving a copy of summons on John W. Haussermann, president, general

manager, controlling member and duly authorized representative agent of said company in the United States and State of Ohio."

On May 6, 1947 Benguet Consolidated Mining Company appeared specially by motion to quash the service of summons. The Court of Common Pleas of Clermont County quashed the service of summons on the ground that Benguet was entitled to be treated as a foreign corporation, and was not doing business in Ohio. The decision was directly contrary to a previous decision in the companion case in Hamilton County, Ohio, raising the identical questions on the identical facts, and between the same parties. See *Perkins* vs. *First National Bank*, et al, 37 Ohio Opinions 162.

The Court of Appeals affirmed the judgment of the Clermont County court. See 88 *Ohio Appeals* 118. A motion to certify the record was allowed by the Supreme Court of Ohio, and on the merits that court affirmed the decisions of the lower court. 155 *Ohio State* 116.

The Supreme Court of Ohio held that a sociedad anonima was entitled to be considered as a foreign corporation under Ohio law, but that *even the doing of business by a foreign corporation in Ohio* will not make the corporation subject to service of process, since the causes of action did not arise in the state and were in no way related to the business or activities of the corporation in the state. The basis of the decision was solely because it was said the service of summons "would be void as wanting in due process of law within the meaning of that term as used in the Fourteenth Amendment to the Constitution of the United States."

The entire portion of the opinion of Judge Taft (pages 119-120) reads as follows:

> "If defendant is a corporation, then the judgments of the Court of Appeals must be affirmed.

"Admittedly, defendant has not appointed any statutory agent upon whom service of process against defendant can be made in Ohio and defendant has not otherwise consented to service of summons upon it in actions brought in Ohio. An examination of the petitions in the instant cases discloses that neither petition states any cause of action in any way related to the business or activities of defendant in Ohio.

"The question is not whether a plaintiff can maintain a suit against a non-resident on a transitory cause of action arising outside Ohio and in no way related to the business or activities of the non-resident in Ohio. The court has held that a plaintiff may where 'personal service is had' on such non-resident (*Mattone vs. Argentina*, 123 Ohio St. 393, 175 N. E. 603) or the defendant has expressly or impliedly consented to service, as by making a voluntary general appearance in the action. *Handy* vs. *Insurance Co.*, 37 Ohio St., 366.

"However, the doing of business in a state by a foreign corporation, which has not appointed a statutory agent upon whom service of process against a corporation can be made in that state or otherwise consented to service of summons upon it in actions brought in that state, will not make the corporation subject to service of summons in an action in personam brought in the courts of that state to enforce a cause of action in no way related to the business or activities of the corporation in that state. *Old Wayne Mutual Life Assn. of Indianapolis* vs. *McDonough*, 204 U. S., 8, 22, 23, 51 L. Ed., 345, 27 S. Ct., 236; *Simon* vs. *Southern Rwy. Co.*, 236 U. S., 115, 129, 130 and 132 59 L. Ed., 492, 35 S. Ct., 255. See, also, *Pennsylvania Fire Ins. Co. of Philadelphia* vs. *Gold Issue Mining & Milling Co.*, 243 U. S., 93, 95 and 96, 61 L. Ed., 610, 37 S. Ct., 344; *Robert Mitchell Furniture Co.* vs. *Selden Breck Construction Co.*, 257 U. S., 213, 215 and 216, 66 L. Ed., 201, 42 S. Ct., 84; *International Shoe Co.* vs. *Washington*, 326 U. S., 310, 319 and 320, 90 L. Ed., 95, 66 S. Ct., 154.

"An examination of the opinions of the Supreme Court of the United States in the foregoing cases will clearly disclose that service of summons in such an instance would be void as wanting in due process of law. This problem has given rise to a great volume of litigation. See annotations at 30 A. L. R., 255, and 96 A. L. R., 366. While there are many cases holding to the contrary, we believe that, if, as the foregoing Supreme Court decisions indicate, *service of a summons in such an instance would be void as wanting in due process of law within the meaning of that term as used in the 14th Amendment to the Constitution of the United States, this court should follow the law on such a federal constitutional question as announced in those decisions by the Supreme Court of the United States.* We are unable to reconcile the decisions in such cases as *Tauza*, vs. *Susquehanna Coal Co.*, 220 N. Y., 259, 115 N. E., 915, with the views which have heretofore been expressed by the Supreme Court of the United States on this question arising under the federal Constitution. However, the Supreme Court of the United States apparently has distinguished the Tauza case and indicated that it would not go to the extent which the New York Court of Appeals went in sustaining the service of process in that case. *International Shoe Co.* vs. *Washington*, supra, 318, 319, 320. The cases of *Cone* vs. *New Britain Mach. Co.*, 20 F. (2nd), 593; *Bennett* vs. *Sinclair Refining Co.*, 144 Ohio St., 139, 57 N. E. (2nd), 776; *International Harvester Co.* vs. *Kentucky*, 234 U. S., 579, 58 L. Ed., 1479; 34 S. Ct., 944; *Beach* vs. *Kerr Turbine Co.*, 243 F., 706; and *United States* vs. *Scophony Corp. of America*, 333 U. S., 795, 92 L. Ed., 1091, 68 S. Ct., 855, relied upon by plaintiff, all involved causes of action or complaints arising out of or related to business done in the jurisdiction where the action was brought."

It will be noticed in both the syllabus of the case, which is the law in Ohio, and the opinion, the court has assumed

Benguet was doing business in Ohio. There was ample evidence to justify this assumption. After Pearl Harbor, Benguet could not do any business in the Philippines and all business transactions emanated from the home and office of John W. Haussermann, the president, in New Richmond, Ohio. In New Richmond, bank accounts were established, directors meetings held, circulars for Securities and Exchange Commission were prepared, and every kind of possible acts to continue Benguet were performed. It did not dissolve during the war, and consequently the headquarters for whatever business Benguet did, for which Haussermann as president continued to draw a salary, and for whatever business was performed or originated, was at New Richmond, Ohio.

While there is nothing in the record to indicate it, the petitioner is actually a citizen of the State of Connecticut, but she does own real estate in Ohio. The opinion of the court would not mean that a resident of Ohio could not bring this action as it would be directly contrary to the provisions of Article I, Section 16, of the Ohio Constitution.

It will be noticed from the opinion that the court has assumed that Benguet Consolidated Mining Company was "doing business" in Ohio. It is, therefore, not necessary to outline the facts showing the business done or that the service was made on a managing agent. The entire question is that assuming a foreign corporation is doing business in Ohio, is it not subject to service of process solely on federal grounds because the cause of action was in no way related to the business of the corporation in the state.

On this point, the court did not review the evidence on the motion to quash, but in deciding the cause merely examined the petitions in both causes of action. Petitioner concedes that the actions for dividends and damages arose

outside of Ohio, but that there was a transfer agent in Ohio, directors meetings held in Ohio, deposits in Ohio banks, and in fact all of the business being done originated in Ohio. If it could not be sued in Ohio, it could not be sued any place other than the Philippine Islands, as all business it did was transacted in Ohio. Under such circumstances the petitioner would have to go to a foreign country for relief and prosecute her action before courts, whose decisions the highest tribunals in New York and California have said reeked with fraud in reference to this controversy.

SPECIFICATIONS OF ERROR

The Supreme Court of Ohio erred:

1. In holding that the due process clause of the Fourteenth Amendment of the Constitution of the United States prevented the institution of an action in Ohio simply because the cause of action was in no way related to the business of the corporation in the state.

2. In holding that such a limitation was not imposed as to a non-resident individual bringing an action against another non-resident individual, but was effective if the defendant was a foreign corporation. Such a holding violates the provisions of Article II, Section 4, of the Constitution of the United States, as well as the Fourteenth Amendment.

REASONS FOR GRANTING THE WRIT

This is the first time that the exact question has been submitted to this court, although text writers, annotators and authors of legal articles have written much about the jurisdiction over foreign corporations when they were doing business in a state, irrespective of where the cause of action arose.

We have no doubt that a state, by statute or by a constitutional provision could refuse jurisdiction over causes of action arising outside of the state as a matter of public policy. The State of Ohio has not done so, and its opinion reiterates the rule that a non-resident individual can sue a non-resident individual on a transitory action in Ohio, no matter where the cause of action arose. Opinion of court, page 119, approving *Mattone* vs. *Argentina*, 123 Ohio St. 393.

It will be conceded that personal service was obtained upon John W. Haussermann, president and general manager of Benguet Consolidated Mining Company. The opinion assumes, and justifiably so, that Benguet was doing business in Ohio. The court quashed the service of summons solely upon the ground that to uphold it would be a violation of the provisions of the Fourteenth Amendment.

The court in making this decision misinterpreted the meaning and effect of *International Shoe Co.* vs. *Washington*, 326 U. S. 310. There service was upheld, although the presence of the corporation in the State of Washington as that term had been construed was open to question. The court after discussing *Pennoyer* vs. *Neff*, 95 U. S. 714, said at page 316:

> "But now that the capias ad respondendum has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment in personam, *if he be not present*, within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notion' of pair play."

Judge Taft, speaking for the Supreme Court, misinterpreted these words. He read them and concluded that even if the corporation was present in the state, there

must be connected and related activities. It was for this reason he said that the decision of *Tauza* vs. *Susquehanna Coal Co.*, 220 N. Y. 259, could not be reconciled with the present law, even though in the International Shoe Company case, the Tauza case had been specifically cited with approval.

His concept of the constitutional aspects of service on foreign corporations is directly opposed to decisions in both the Second and Sixth Circuits.

Judge Learned Hand, in *Bomze* vs. *Nardis Sportswear*, 165 Fed. (2nd) 33, 35 (CCA 2), pointed out:

> "However, we understand that since *Tauza* vs. *Susquehanna Coal Co., supra,* the law of New York has been that a 'foreign corporation' is either 'present' or is not; and once it is found to be 'present,' it becomes subject to process *regardless of whether the particular liability in suit has arisen out of the activities* which collectively constitute the presence."

Such a statement could hardly be the law even in New York if the federal Constitution prohibited causes of action to be entertained if they related to matters or activities of the corporation outside the state.

The court in the International Shoe Company case held that a foreign corporation either had to be present, or have certain minimal contacts in the state, such as were found later by a majority of this court in *Travellers Health Association* vs. *Virginia*, 319 U. S. 641. No member of this court has ever said that there must be not only "presence" but also connected and related contacts to satisfy the due process clause.

The identical question arose in an Ohio case in the Sixth Circuit Court of Appeals some years ago, and that court upheld the service of summons even though the cause of action arose outside of Ohio. In that case, *Maichek* vs. *Bertha Consumers Co.*, 25 Fed. (2nd) 257 (CCA

6), after commenting on Sections 11276 and 11290, Ohio General Code, Judge Dennison said:

> "Construing that statute and the applicable general law, it must be taken as a settled rule in Ohio that a foreign corporation, actually doing business within the state and having therein a managing agent who is served, is subject to be sued therein upon a transitory cause of action arising outside of the state. *Handy* vs. *Ins. Co.*, 37 Ohio St. 366, 370; *Loftus* vs. *Pennsylvania R. R. Co.*, 107 Ohio St. 352, 140 N. E. 94. It is suggested, rather than distinctly claimed, that the state cannot rightly subject a foreign corporation to this burden (see *Robert Mitchell Furniture Co.* vs. *Selden Co.*, 257 U. S. 213, 216, 42 S. Ct. 84, 67 L. Ed. 201); but there has been no such distinct holding by the Supreme Court and we think we should accept the Ohio rule as affecting foreign corporations which locate themselves in the state for business purposes."

In other words, until the Supreme Court of Ohio held otherwise, the Ohio courts had always upheld service where the corporation was found or was present in the state, no matter where the cause of action arose. See also *Southwick Foundry and Machine Co.* vs. *Franz Foundry Co.*, 48 Fed. (2nd) 714 (CCA 6).

This court had this same question before it in *Philadelphia and Reading Railway Company* vs. *McKibbin*, 243 U. S. 265, but found it unnecessary to decide it. As said by Justice Brandeis:

> "As the defendant did no business in New York, we need not consider its other contention that it could not be sued there on a cause of action arising in New Jersey, and in no way connected with the business alleged to be done in New York. On this proposition we express no opinion."

It is now time to decide this proposition, as it is assumed or conceded that Benguet Consolidated Mining

Company was doing business in Ohio, and the question posed is squarely presented.

The Ohio Supreme Court has attempted to apply a rule of *forum non conveniens* as a constitutional doctrine erroneously. See *Barrow* vs. *Kane*, 170 U. S. 100.

However, the decision would not be valid under a statutory or judicial provision of *forum non conveniens*. The Republic of the Philippine Islands is now a foreign country. If the Ohio decision remains unchallenged, the petitioner, an American citizen, would be forced to go to a foreign country to enforce her rights before courts which have demonstrated marked unfriendliness. The president of Benguet is in the jurisdiction, the transfer agent is here, and the directors are all citizens of the United States. Even in a case in the federal courts, the rule of *forum non conveniens* would not be applicable under such circumstances. Cf. *Swift & Co.* vs. *Compania Del Caribe*, 339 U. S. 684.

There is, however, another cogent reason to review and reverse this cause. The Ohio court has given a greater right to a foreign corporation than to a non-resident citizen, but a citizen of the United States. It has discriminated against the non-resident citizen in favor of the foreign corporation.

This court has held since 1886 that foreign corporations are entitled in many matters to equal protection of the laws. *Wheeling Steel Corporation* vs. *Glander*, 337 U. S. 562. In reviewing the record in this case, and if the writ is denied, the court could, without exception, join with Mr. Justice Jackson in saying,

> "So far as I recall this is the first time this Court has held rights of individuals subordinate and inferior to those of organized groups. I think that is an inverted view of the law * * * it is justice turned bottomside up:" *Joint Anti-Fascist Refugee Committee* vs. *McGrath*, 19 U. S. Law Week 4232, 4252.

CONCLUSION

For the reasons stated this petition for writ of certiorari should be granted, and the decision of the Supreme Court of Ohio reversed.

Respectfully submitted,

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